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72-326

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AUG 25 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-326

GEORGE N. CHARLTON, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA and JOHN W. MACY, JR., J. LUDWIG ANDOLSEK and ROBERT E. HAMPTON, Members of the United States Civil Service Commission,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JEROME M. LIBENSON,
HAROLD GONDELMAN,
Attorneys for Petitioner,
1018 Frick Building,
Pittsburgh, Pa. 15219,
(412) 562-8718.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
5701 PARKLINE DR., PITTSBURGH, PA. 15227
412-881-7463

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IN THE

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No. .....

GEORGE N. CHARLTON, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA and JOHN W. MACY, JR., J. LUDWIG ANDOLSEK and ROBERT E. HAMPTON, Members of the United States Civil Service Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered June 15, 1972.

Citations to Opinion Below

The Opinion of the United States Court of Appeals for the Third Circuit, filed June 15, 1972, is printed in Appendix "A" hereto. The judgment of the United States Court of

Appeals for the Third Circuit entered June 15, 1972, affirming the judgment of the United States District Court for the Western District of Pennsylvania filed May 28, 1971, is printed in Appendix "B" hereto. The Order denying the petition for rehearing entered July 27, 1972 is printed in Appendix "C" hereto.

Jurisdiction

The judgment of the Court of Appeals below, Appendix "B", was entered on June 15, 1972. Rehearing was sought and the petition for rehearing was denied on July 27, 1972 and judgment entered July 27, 1972. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented for Review

1. Where a Special Agent for the Internal Revenue Service is removed from his veterans' preference Civil Service protected position "to promote the efficiency of the Service" and the charges against him are that he failed to report an attempted bribe; and where the government of the United States indicts the Special Agent on the same facts for soliciting and demanding a bribe from the same person and at the same time; and where the Court of Appeals has found:

> "And despite our feeling that Charlton's removal is a severe punishment for the violations that were charged, we cannot say that the discharge is arbitrary, capricious, or an abuse of discretion."

and the criminal charges brought against the Civil Service employee resulted in a verdict of not guilty, did not the inconsistencies in the charges by the government of the United States as well as his acquittal of the criminal charges require that petitioner be reinstated to his Civil Service protected job with retroactive pay?

Constitutional Provisions, Statutes and Rules Involved

The constitutional provisions involved are the Fifth Amendment to the Constitution of the United States, and due process of law under circumstances which have deprived petitioner of a Civil Service protected job under circumstances where there is no credible evidence in the record to sustain his dismissal.

The statutory provisions involved are the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*, a proceeding to review the administrative determination.

Statement of Facts

George N. Charlton, Jr. was a Special Agent for the Internal Revenue Service, with a classification of GS-12. On September 17, 1963 the District Director of the Internal Revenue Service in Pittsburgh, Pennsylvania removed him from the Internal Revenue Service effective Septembr 29, 1963, for the reason that said removal was "to promote the efficiency of the Service". Charlton appealed from the dismissal and hearings were held before a Hearing Officer of the Commission. The charges against him were:

> "Failure to report attempted bribery under subsection 1941.73"
>
> and
>
> "Failure to properly care for official documents under subsection 1941.62 of the rules of conduct for Internal Revenue Service employees".

The Hearing Officer concluded that:

> "Charge I is sustained, but with the qualification that Charlton's failure to report the bribe has not been shown to have been due to criminal intent. As to charge 2, namely, failure to properly care for official documents, the case is much easier of solution, since the Government's proof fails on every point."

The Regional Commissioner of Internal Revenue Service sustained the action of the District Director in summarily removing petitioner from his position. In his decision he held:

> "That Mr. Charlton received a bribe *offer* which under the circumstances he must have recognized as such and that he failed to report this offer within a reasonable period of time. Charge 2 is sustained on the basis of evidence that he retained official documents, namely, number slips and memoranda concerning them which he had prepared as part of his official duties, with the intention of delivering them to a person not authorized to receive them; further, that he had performed acts pursuant to this intention sufficient to warrant the conclusion of the District Director that he had failed to properly care for official documents". (Emphasis added.)

This decision was appealed to the Regional Office of the United States Civil Service Commission, which sustained the action of dismissal. Finally, the Board of Appeals and Review of the United States Civil Service Commission sustained the action of dismissal.

Charlton then instituted an action in the United States District Court for the Western District of Pennsylvania for judicial review of the administrative proceedings, alleging, *inter alia*, that the action was "arbitrary, capricious, unsupported by substantial evidence and unwarranted by the facts". He further alleged in the complaint that he was indicted December 3, 1965 to Criminal Action No. 65-291 in the same District Court on charges that he did "corruptly ask, demand, solicit, seek and agree to receive certain sums of money". The criminal action was tried in the same District Court and resulted in the verdict of "not guilty". It was thereafter that the complaint was filed under the Administrative Procedure Act. The District Court granted summary judgment on April 26, 1967, holding that since

procedural due process had been met judicial review terminated. An appeal was taken to the Court of Appeals for the Third Circuit and in *Charlton v. United States,* 412 F. 2d 390 (C. A. 3, 1969), judgment was reversed with directions to the District Court to review the administrative record and to determine whether the Commission's action was supported by substantial evidence, or arbitrary, capricious and an abuse of its discretion. On remand, the District Court again granted summary judgment for the defendants setting forth a thorough review of the record and finding that it was supported by substantial evidence. A second appeal to the Court of Appeals for the Third Circuit resulted in the affirmance of the granting of summary judgment, from which affirmance this petition for certiorari is filed.

Reasons for Granting the Writ

George N. Charlton, Jr. was fired by the government of the United States for failing to report an attempted bribe referred to by the Commission as a "bribe offer". Charlton was indicted by the government of the United States for corruptly *soliciting* a bribe. In one instance he was fired for failing to report that a bribe was offered, and in the second instance, and on the same facts, he was indicted for demanding from the same person the bribe. Had Charlton been fired for demanding a bribe and then indicted and acquitted on that charge, perhaps his appeal would lack merit. But that is not what occurred. The lack of substantial evidence which the courts below have failed to recognize is that this same party, to-wit, the government of the United States, has alleged inconsistent facts, in one instance to fire Charlton and in the other to indict him. When a litigant has alleged such inconsistencies, the courts unanimously have held that he proves nothing. The deci-

sions of the court below give judicial approval to the inconsistent positions because the litigant in this case is the government of the United States.

The Hearing Examiner, who saw the witnesses and reviewed the testimony, found:

> "And there are facts in Charlton's favor of much stronger significance. Thus, it is conceded that Charlton's reputation was excellent, while that of his accuser, John James, is bad. There is no direct evidence of Ferraro's reputation, but from the testimony in this case, there can be no doubt as to what it is. *Consequently, this case is one in which a man of good reputation is accused by people of ill repute, a fact which, in itself, throws great doubt on the Government's case.*
>
> "Moreover, it is also conceded that Charlton was an agent of extraordinary ability. As such he was an obvious menace to Ferraro, and it is clear that Ferraro was out to pin something on Charlton, guilty or not." (Emphasis added.)

The administrative record is replete with statements of Charlton's superiors and co-workers that he had an excellent reputation as being one of the most successful undercover agents in the Internal Revenue Service and that his integrity, honesty and dependability were proved as a matter of general reputation.

It is also demonstrated that in 1962 the head of the Internal Revenue Service in the Pittsburgh Area sent petitioner a letter of commendation and in June, 1963 the same head of the Service awarded petitioner the United States Treasury Certificate of Award, including a cash award of $310.00 under the Incentive Awards Program.

Although the circumstances under which the alleged solicitation of a bribe or failure to report an attempted bribe revealed that a police officer of the City of Pittsburgh,

John James, was somehow involved in pointing a finger of guilt at petitioner, neither John James nor the racketeer, William Ferraro, were called as witnesses before the administrative tribunal.

The only evidence used to justify the charges against petitioner was his own statement, extracted by his superiors, when Charlton stated he was threatened with dismissal if he refused to make a statement. No court below has considered that petitioner's constitutional rights were violated by requiring a statement from him under the circumstances nor have they considered the effect of *Garrity v. State of New Jersey*, 87 S. Ct. 616, 385 U. S. 493 (1967) and *Spevack v. Klein*, 87 S. Ct. 625, 385 U. S. 511 (1967) on the admissibility of his own statements to sustain the charges against him. Although this issue has not been considered by the courts below, it is petitioner's contention that even considering his own statements, there is no substantial evidence sustaining the severe punishment of destroying eleven years of Civil Service employment, with the accrued benefits and pension rights, to a veteran whose reputation is established by the overwhelming preponderance of the evidence in the administrative proceedings as excellent for honesty and integrity and whose awards indicate recognition of his excellent expertise in undercover work. The acting Chief of Intelligence and later Assistance Chief of Intelligence of the Internal Revenue Service testified that petitioner had the reputation of being a genius and that in his undercover work he was resourceful.

In *Scott v. Macy*, 349 F. 2d 182 (C. A. Dist. of Col., 1965), an applicant who took a competitive test for Federal Civil Service employment was given greater protection and rights in obtaining that employment than petitioner with

his eleven years of devoted, excellent service to his government. In the *Scott case*, the applicant was held to be disqualified by the Civil Service Commission because the record disclosed that he had engaged in homosexual conduct. The Court of Appeals for the District of Columbia held:

> "Appellant is an applicant for public employment, and thus may have less statutory protection against exclusion than an employee. But he is not without constitutional protection. The Constitution does not distinguish between applicants and employees; both are entitled, like other people, to equal protection against arbitrary or discriminatory treatment by the Government. The Executive may have discretion in hiring or firing, but 'discretionary power does not carry with it the right to its arbitrary exercise.'"

On March 26, 1968 the Civil Service Commission Board of Appeals ordered one Alex B. Possino, an agent employed by the Internal Revenue Service in Pittsburgh, restored to duty with back pay. In its opinion, the Civil Service Commission Board of Appeals held:

> ". . . both were leading gambling rackets figures in the Pittsburgh area, both were convicted for violation of Federal gambling laws, both were admitted perjurers and both were seeking the assistance of the U. S. attorney in reducing their sentences by making disclosures of alleged bribery of public officials in the Pittsburgh area."

The Board found that the uncorroborated evidence of racketeers was insufficient to sustain the charges which would result in the death of an agent's civil service rights and protection.

The Court of Appeals for the Third Circuit itself felt that petitioner's dismissal was severe punishment for the violations charged. Petitioner has been fighting for his

reinstatement not only because his removal is severe punishment for violations charged but is unconscionable punishment and arbitrary and capricious action for charges which were unfounded and unproved and not sustained by any evidence let alone substantial evidence.

The Hearing Examiner, who saw and heard the witnesses, found there was no evidence to sustain the charge of improper handling of government records. Although he found that there was some evidence that petitioner failed to report a bribe, he stated it was not shown to have been due to criminal intent. As above stated, the first charge is destroyed by the government's own inconsistency in indicting petitioner for demanding the bribe that he is alleged to have failed to report as an attempted bribe.

As stated by the Court of Appeals for the District of Columbia in *Scott v. Macy, supra*, a government employee is entitled like other people to equal protection against arbitrary or discriminatory treatment by the government. Petitioner has been dealt with in a most arbitrary and capricious manner, perhaps because he is black. He is deprived of substantial employment benefits and vested pension benefits without any evidence offered by the government to sustain its action in destroying those rights. A hearing by your Honorable Court on the merits is Charlton's last chance to correct the wrong he has suffered.

Respectfully submitted,

JEROME M. LIBENSON,
HAROLD GONDELMAN,
Attorneys for Petitioner.

APPENDIX "A"

Opinion of the Court

(Filed June 15, 1972.)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1629

GEORGE N. CHARLTON, JR.,

Appellant,

v.

UNITED STATES OF AMERICA and JOHN W. MACY, JR., J. LUDWIG ANDOLSEK and ROBERT E. HAMPTON, Members of the United States Civil Service Commission,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 5, 1972

Before: Van Dusen, Rosen, and Hunter, Circuit Judges.

Appendix "A"—Opinion of the Court.

PER CURIAM:

Appellant George N. Charlton, Jr., a special agent for the Internal Revenue Service, was removed from his position on September 29, 1963, "to promote the efficiency of the Service." The specific charges against Charlton were that he had (1) failed to report an attempted bribe; and (2) failed properly to care for official documents. The Hearing Officer sustained the removal of Charge 1 but found Charge 2 not proven. The Regional Commissioner, however, upheld the removal on both charges. Charlton exhausted his administrative appellate rights, and then brought an action in the District Court under the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*, to review the administrative determination. The defendants' motion for summary judgment was granted by the District Court on April 26, 1967. The District Court found that all procedural requirements had been met, and held that the merits of the dismissal were beyond the scope of judicial review.

On appeal from that order, we reversed and remanded for further review of the administrative record. We held that 5 U. S. C. § 706 required the District Court:

> "to review the administrative record and to determine whether the Commission's action was supported by substantial evidence, or arbitrary, capricious and an abuse of its discretion."

Charlton v. United States, 412 F. 2d 390, 393 (3d Cir. 1969). On remand, the District Court again granted summary judgment for the defendants after a thorough review of the administrative record. Charlton has again appealed to this court.

While we may have drawn inferences from the evidence that would be different from those drawn by the Commission, our review of the record reveals substantial evidence that supports the charges for which Charlton was removed from his I. R. S. position. And despite our feeling that Charlton's removal is a severe punishment for the violations that were charged, we cannot say that the discharge is arbitrary, capricious, or an abuse of discretion.

The District Court's order granting summary judgment for the defendants will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX "B"

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1629

GEORGE N. CHARLTON, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA and JOHN W. MACY, JR., J. LUDWIG ANDOLSEK and ROBERT E. HAMPTON, Members of the United States Civil Service Commission.

(D. C. Civil Action No. 65-445.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Present:

Van Dusen, Rosen and Hunter, Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 28, 1971, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

THOMAS P. QUINN,
Clerk.

June 15, 1972.

APPENDIX "C"

Sur Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1629

GEORGE N. CHARLTON, JR.,

Appellant,

v.

UNITED STATES OF AMERICA and JOHN W. MACY, JR., J. LUDWIG ANDOLSEK and ROBERT E. HAMPTON, Members of the United States Civil Service Commission.

Present:

Seitz, Chief Judge, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Rosen, and Hunter, Circuit Judges.

The petition for rehearing filed by George N. Charlton, Jr., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

By the Court,

JAMES HUNTER III,
Judge.

Dated: July 27, 1972.

72-326

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AUG 25 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. .....

GEORGE N. CHARLTON, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA and JOHN W. MACY, JR., J. LUDWIG ANDOLSEK and ROBERT E. HAMPTON, Members of the United States Civil Service Commission,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JEROME M. LIBENSON,
HAROLD GONDELMAN,
Attorneys for Petitioner,
1018 Frick Building,
Pittsburgh, Pa. 15219,
(412) 562-8718.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
1701 PARKLINE DR., PITTSBURGH, PA. 15227
412-881-7469.

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APPENDIX D

HAR:SWP:dhp

January 8, 1965

Mr. Martin M. Sheinman,
Attorney at Law,
1122 Frick Building,
Pittsburgh, Pennsylvania 15219.

Dear Mr. Sheinman:

Further reference is made to your appeal in behalf of Mr. George N. Charlton, Jr., from the decision of the Commission's Philadelphia Regional Office which sustained, under Part 22-B of the Civil Service Regulations (currently titled Part 752-B), the action taken whereby Mr. Charlton was removed on charges, effective September 29, 1963, from the position of Criminal Investigator (Special Agent), 08-12, with the Internal Revenue Service at Pittsburgh, Pennsylvania.

The decision issued by the Commission's Philadelphia Regional Office on June 2, 1964, held that the procedural requirements of the regulations had been complied with in Mr. Charlton's case, and that his removal, based upon the sustained charges, was warranted and accomplished for such cause as to promote the efficiency of the service. The Board of Appeals and Review has fully considered the entire appellate record in Mr. Charlton's case, including all information developed during the processing of his appeal by the Philadelphia Regional Office, and the subsequent representations which have been submitted in the further appeal to the Board.

Appendix D

The record shows that by an advance notice dated June 28, 1963, Mr. Charlton was advised of a proposed action to remove him from the service, based upon separate charges of failure to report attempted bribery and failure to properly care for official documents, with specifications. The Board finds that Mr. Charlton was accorded proper opportunity to reply to the advance notice, orally and in writing, and following consideration of his response to the charges, a final notice of adverse decision was issued on September 17, 1963, which properly stated the final decision to effect Mr. Charlton's removal on September 29, 1963. On the basis of the record shown, the Board of Appeals and Review concurs in the previous finding of the Philadelphia Regional Office that the procedural requirements of the regulations were complied with in the accomplishment of Mr. Charlton's removal.

As to the merits of the case, the decision issued by the Philadelphia Regional Office discussed in detail the charges, specifications, and related evidence upon which the removal action and Mr. Charlton's appeal were based, and the subsequent representations submitted to the Board of Appeals and Review are found to present no issues which were not fully and properly considered in the Regional Office's decision. The Board of Appeals and Review finds, as did the Regional Office, that Mr. Charlton was approached with an unmistakable bribe offer on August 13, 1964, as charged, and that he took no proper action to report the matter as clearly required in the circumstances, during an approximate twenty-four hour period prior to being taken into custody on August 14, 1963. With respect to the charge of failure to properly care for official documents, the Board concurs in the Regional Office finding that

when Mr. Charlton was apprehended on August 14, 1963, by his own admission, he was intent upon an unauthorized release of evidence of criminal violations which was in his possession, in return for other information promised. In considering Mr. Charlton's contentions of innocent involvement during the occurrences on August 13 and August 14, 1963, the Board particularly notes that Mr. Charlton had failed to fully reveal the incriminating aspects of his conduct at any time prior to an interrogation conducted on August 23, 1963. The Board of Appeals and Review cannot give credence to the variant explanations subsequently offered to refute the misconduct admitted by Mr. Charlton under the August 23 interrogation.

In summary, the Board of Appeals and Review concurs in the finding of the Commission's Philadelphia Regional Office that the procedural requirements of the regulations were complied with in the accomplishment of Mr. Charlton's removal. The Board further finds that the charges and supporting specifications are sustained by a preponderance of the evidence, and that Mr. Charlton's removal was warranted on the strength of the sustained charges and clearly taken for such cause as to promote the efficiency of the service. Accordingly, the previous decision of the Commission's Philadelphia Regional Office, sustaining the removal action accomplished by Mr. Charlton's case, is hereby affirmed by the Board of Appeals and Review.

For the Commissioners:

Sincerely yours,

E. T. GROARK,
Chairman, Board of Appeals and Review.

Appendix D

Re case of George N. Charlton, Jr.

Distribution:

Philadelphia Region

Mr. George N. Charlton, Jr.
916 Brushton Avenue
Pittsburgh, Pennsylvania 15203

Regional Commissioner
Internal Revenue Service
U. S. Treasury Department
2 Penn Center Plaza
Philadelphia, Pennsylvania 19102

Mr. M. J. Flattery
Appeals Officer
Internal Revenue Service
Washington, D. C. 20224

APPENDIX E

Memorandum

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE N. CHARLTON, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA and JOHN W. MACY, JR., J. LUDWIG ANDOLSEK and ROBERT E. HAMPTON, Members of the United States Civil Service Commission,

Defendants.

Civil Action No. 65-445.

MILLER, *D. J.*

Plaintiff, prior to his removal, was a career civil service employee holding a position as Criminal Investigator (Special Agent) and was attached to the Pittsburgh District Office of the Internal Revenue Service.

On August 28, 1963, action of proposed removal was initiated by the Service, against plaintiff, for the following reasons: (1) failure to report an attempted bribery

in violation of Subsection 1941.73[1] of the Rules of Conduct for Internal Revenue Service Employees, and (2) failure to properly care for official documents in violation of Subsection 1942.62[2] of the Rules.

Plaintiff replied to the proposed removal orally on August 29, 1963, and in writing on September 3, 1963. On September 17, 1963, plaintiff was informed that he would be removed from his position because the charges against him were fully supported by the evidence and warranted his removal to promote the efficiency of the Service. Plaintiff was informed of his appeal rights and the removal became effective on September 29, 1963.

Plaintiff appealed his removal to the Commissioner of Internal Revenue Service, Philadelphia, Pennsylvania, and was granted a hearing held in Pittsburgh, Pennsylvania, on November 29 and 30, 1963, at which time plaintiff was represented by counsel.

---

[1] Subsection 1941.73 (I. R. Manual, T. M. 1900-52, October 28, 1963):

"(2) Bribe offers are often made indirectly and subtly, rather than in a direct fashion. Employees must be perceptive and alert in recognizing such bribe overtures and must promptly report them so that trained personnel can evaluate the facts and initiate investigation when sufficient evidence warrants. Any employee who has reasonable grounds for believing that an attempt to bribe him has been or will be made has the duty to:

(a) * * *

(b) immediately report the matter by telephone where necessary, to the servicing Inspection Office in the employee's region or district. The telephone numbers of Inspection Offices are posted on bulletin boards in every Internal Revenue Office. The calls may be made collect."

[2] Subsection 1942.62 (I. R. Manual, T. M. 1900-41, January 31, 1963):

"(1) The care of Government documents is a federal requirement which is regulated by legislation. All records and documents in the custody of Revenue Service employees are in their custody for official purposes only. It is unlawful to remove or conceal, alter, mutilate, obliterate, or destroy records or documents or to remove or attempt to remove with the intent of performing any of the above actions. Employees must not remove records and documents from official files without approval from proper authority. Working papers, copies of reports, and other official records and documents shall be promptly sent to file when no longer needed for official purposes. Disposal or destruction of records and documents is to be made in accordance with established requirements."

Appendix E

On February 2, 1964, the Hearing Officer filed his report and concluded that Charge I, *i.e.,* failure to report an attempted bribery, was sustained but that Charge II, *i.e.,* failure to properly care for official documents, was not sustained. Nevertheless, the Regional Commissioner, Internal Reveune Service, upon review of the entire record, including the Hearing Officer's report sustained both charges and affirmed the decision of the District Director removing Plaintiff from the Service.

Plaintiff was advised of his right of further appeal to the Civil Service Commission. He filed an appeal on March 13, 1964. Plaintiff waived a hearing before the Commission and requested that a determination be made on the record.

The Civil Service Commission, Philadelphia Regional Office, found that the Internal Revenue Service had complied substantially with the procedural requirements of the law and regulations in removing plaintiff. The Commission's Regional Appeals Office found that the record sustained both charges and established that plaintiff's removal was taken for such cause as will promote the efficiency of the Service.

On June 4, 1964, plaintiff appealed the decision to the Commission's Board of Appeals and Review. The Board sustained the decision of the Commission's Philadelphia Regional Office by its decision letter of January 8, 1965.

Plaintiff then filed this action, under 5 United States Code, Section 701, *et seq.,* alleging that there is no substantial evidence upon which to base the removal and that such action is arbitrary, capricious and an abuse of discretion. The defendants filed a Motion for Summary

Appendix E

Judgment which was granted by this Court in an Opinion and Order filed April 26, 1967.

Plaintiff appealed and obtained a remand from the Third Circuit. The opinion by Judge Kalodner, 412 F. 2d 390 (June 2, 1969), directs the District Court, pursuant to 5 United States Code, Section 706, to broaden inquiry into the administrative record and to assure itself not only that procedural requirements have been satisfied in the administrative proceedings, but also that the administrative record establishes that the agency's action is supported by substantial evidence and that the removal was not arbitrary, capricious or an abuse of discretion.

Upon remand, the defendants' original Motion for Summary Judgment was reinstated.

In its Opinion of April 26, 1967, this Court held that:

> "A careful and thorough examination of the administrative record in this case reveals no error in the procedures followed by the officials who participated in the proceedings to dismiss plaintiff. We are satisfied that there has been substantial compliance with all the applicable procedural and statutory requirements."

This Court must now determine whether the administrative record establishes that substantial evidence supports the agency's action or whether plaintiff's dismissal was arbitrary, capricious or an abuse of discretion.

An examination of the administrative record ascertained the following facts:

Appendix E

One of the plaintiff's duties as an undercover man was to make "buys", that is, to place bets on numbers, in such quantities as to sustain probable cause for the issuance of warrants and to produce evidence for trials.

At the hearing, evidence was adduced that plaintiff would visit establishments where he had reason to believe a bet could be placed and he would attempt to do so. If he succeeded in placing a bet and if he received a slip evidencing the same, plaintiff would make some annotations on the back of the slip. As soon as reasonably possible thereafter, plaintiff would prepare a handwritten memorandum describing in detail what had happened in connection with the bet. This memorandum together with the slip would be retained on or near his person, often in a briefcase in the trunk of his automobile. On his next visit to the office, which might be as long as a week later, he would turn in all the slips and the memoranda he had prepared. (Encl. 7, pp. 88, 89, 90).[3]

In order to perform their job more effectively, agents in Charlton's position had to "blend with the environment" (Encl. 7, p. 84) in terms of dress and hours kept and it was often necessary to drink on the job (Encl. 7, p. 63). They frequently had to make decisions on their own in the field (Encl. 7, p. 68) and it was essential to maintain secrecy in contacting the office. Plaintiff's working habits were therefore informal and unconventional.

On August 13, 1963, while in an establishment known as the B and M Tavern, Charlton was introduced to one

[3] References are to Enclosures in the official documents relating to the appeal of George N. Charlton, Jr. filed with the United States Civil Service Commission.

Bill Ferraro who offered to assist him in getting into seven or eight local numbers establishments (Encl. 7, p. 94), if he would forget about the B and M Tavern (Encl. 7, p. 106). Ferraro then made an appointment to see Charlton the following day.

On August 13, after having met with Ferraro, Charlton called Mr. Green, his Group Supervisor, and stated, "I have a surprise for you," and pursuant to the usual practice in such cases, no details were stated (Encl. 7, p. 117).

On August 14, Mr. Davis, Chief Intelligence Division, Internal Revenue Service, was informed by one Officer James of the Pittsburgh Police Department that Charlton was trying to shake Ferraro down and that the pay-off would take place shortly at the B and M Tavern. Davis insisted that Internal Revenue Service agents accompany the local police officers to the Tavern (Encl. 7, p. 136).

Later that same day, Charlton met Ferraro in front of the B and M Tavern. At this time, Charlton had the number slips and memoranda relating to the B and M Tavern in his pocket. The slips and memoranda as to other numbers operations were in his brief case in the trunk of his car (Encl. 7, pp. 96-97). After Charlton refused to enter the Tavern, he and Ferraro conversed briefly in Charlton's car. Charlton asked for the names of the numbers establishments. Ferraro said he didn't have the information but that there ". . . might be something else in it for you. Maybe $1,000." Charlton said, ". . . forget it," and claims that he did not consider this to be a bribe offer (Encl. 7, p. 97).

Charlton and Ferraro then left the car to view an accident which had occurred nearby and Charlton lost sight

of Ferraro. When Charlton returned to his car, he saw Ferraro standing near the car talking to Officer James. At about the same time, Internal Revenue Agents appeared at the scene (Encl. 7, p. 98). Charlton was taken into custody and his car was searched. Five twenty dollar bills were found between the back rest and the seat. Charlton denied all knowledge of the money and maintained that he never intended to accept any money or to turn over slips or memoranda to Ferraro (Encl. 7, p. 99).

On August 23, 1963, Charlton signed a one-page statement wherein he admitted to having received a bribe offer on August 13, 1963, and admitted he was going to give Ferraro the number slips and memoranda. Plaintiff claimed that the statement was extracted by his superiors and that he was threatened with dismissal if he refused to talk. The Hearing Officer decided to consider the statement and held that ". . . a statement such as the one in question cannot operate to convict Charlton by foreclosing all further inquiry. At most, it can only be considered as one of the factors in the case, and must be read in the light of Charlton's explanations, provided, of course, they are logically satisfactory." (Encl. 8, p. 14)

The plaintiff contends that a review of the entire record in this case leaves little doubt that the government's dismissal action was arbitrary and capricious. Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis. See *Carlisle Paper Box Co. v. N. L. R. B.*, 398 F. 2d 1 (3 Cir. 1968) and *N. L. R. B. v. Jas. H. Matthews & Co.*, 342 F. 2d 129 (3 Cir. 1965).

Appendix E

The Hearing Officer, having analyzed the record and all other available evidence, in sustaining Charge I, *i.e.*, failure to report an attempted bribery, concluded that under the circumstances Ferraro's statement to Charlton was an obvious offer of a bribe; that the circumstances of this case point to some sort of bribe offer being made to Charlton on August 13, 1963 (Encl. 8, p. 15); that Charlton was aware of his duty to report bribe offers; that Charlton's call to Green on August 13 cannot be construed as a report of the incident; that it would have been readily possible for Charlton to report the bribe offer (Encl. 8, p. 16) and that Charlton's failure to report the bribe had not been shown to have been due to criminal intent (Encl 8, p. 21).

The Hearing Officer did not sustain Charge II, *i.e.*, failure to properly care for official documents on the grounds that Charlton had a perfect right to the possession of the slips and memoranda found on him at the time of his meeting with Ferraro (Encl. 8, p. 22).

The Regional Commissioner, Internal Revenue Service, having reviewed the entire record, sustained both charges against Charlton on the following grounds:

> "I find the charges upon which removal was based, both Charge I and Charge II, to be supported by the evidence. The facts relating to Charge I establish that Mr. Charlton received a bribe offer which under the circumstances he must have recognized as such and that he failed to report this offer within a reasonable period of time. Charge II is sustained on the basis of evidence that he retained official documents, namely, numbers slips and memoranda concerning

them which he had prepared as part of his official duties, with the intention of delivering them to a person not authorized to receive them; further, that he had performed acts pursuant to this intention sufficient to warrant the conclusion of the District Director that he had failed to properly care for official documents" (Encl. 9, p. 1).

The Civil Service Commission's Philadelphia Regional Office, upon review of the entire record in sustaining Charlton's dismissal stated:

"In essence, the appellant contends that the agency has not shown cause for his removal other than the charged technical violations of agency regulations. We believe that the significance of the appellant's actions, and in particular his failure to report the attempted bribery, is apparent from the circumstances of the case. . . . By the appellant failing to report the bribe offers, made by 'Bill,' to the servicing Inspection office (or to anyone in authority at the agency), the agency was embarrassed (to say the least) and left without any evidence of before-the-fact knowledge of the scheduled meeting of 'Bill' and Mr. Charlton on the afternoon of August 14, 1963, and of the bribe overtures made by 'Bill' on the 13th, when the Pittsburgh Police Department apprised the agency of the meeting which was to be held between 'Bill' and Mr. Charlton on August 14. Had Mr. Charlton complied with Subsection 1941.73 of the Rules of Conduct and reported the bribe offer, not only his integrity but that of the agency would have been protected.

"Because of Mr. Charlton's long and wide experience in the field, the agency concludes that his failure to report the bribe attempt was deliberate.

"The record reveals that Mr. Charlton exercised much initiative in performing his duties and that he was given wide latitude by the agency to act independently. However, he was still bound by the requirement to recognize and report bribe overtures so that trained personnel could evaluate the facts. The indications are that Mr. Charlton elected to bypass the servicing Inspection office in order to negotiate a deal with 'Bill' to obtain the information which would assist him 'in making seven or eight cases.' The appellant's actions in the subject case have given the agency cause to question whether his excellent past record for 'making cases' did not result from similar agreements" (Encl. 12, p. 4).

The Civil Service Commission concluded:

"Our ultimate finding is that the agency action was taken for such cause as will promote the efficiency of the service within the meaning of the language in the Civil Service Regulations" (Encl. 12, p. 5).

The Civil Service Commission's Board of Appeals and Review, having reviewed the entire appellate record including all information developed during the processing of appeals, in sustaining Charlton's dismissal found that all charges, specifications and related evidence had been fully and properly considered (Encl. 15, p. 2).

The Court, having made a careful and thorough review of the entire administrative record before it, is satisfied

that there is a rational basis for Charlton's dismissal and that the agency's action is therefore not arbitrary and capricious nor an abuse of discretion. The Court is satisfied that the evidence in the record supports both Charges and establishes that Charlton failed to report an attempted bribery and that he improperly retained certain number slips on his person at a time when other such slips were in the trunk of his car. The Court finds that evidence supports the conclusion reached by the Regional Commissioner, Internal Revenue Service, and the Civil Service Commission that Charlton retained the slips on his person with an intent to deliver them to an unauthorized person for an improper purpose. It was not improper under the circumstances to disregard the conclusion of the Hearing Officer, who did not sustain the second Charge, and to rigorously interpret the standards of conduct to which agents in Charlton's position must be held. This did not prejudge Charlton's character or personality nor the facts of the case.

Charlton, a college graduate, who had been a special agent for about ten years and had been engaged in undercover work for about five years, was an experienced individual who knew of his obligation to the Internal Revenue Service with respect to the conduct with which he was charged and failed to maintain the high standards of conduct formulated by the Service for its employees. The lack of criminal intent found by the Hearing Officer as to Charge I. is irrelevant under the circumstances.

The review of the administrative record also discloses that the agency's action is supported by substantial evidence.

Appendix E

Substantial evidence has been defined as being more than a scintilla and capable of doing more than creating a suspicion of existence of the fact to be established. It means such relevant evidence as a reasonable mind might adopt as adequate to support a conclusion. See *N. L. R. B. v. Arkansas Grain Corp.*, 392 F. 2d 161 (1968) and *Celebrezze v. Bolas*, 316 F. 2d 498 (1963).

The Hearing Officer in sustaining Charge I found sufficient evidence to conclude that Ferraro's statement to Charlton on August 13, 1963, was an obvious offer of a bribe (Encl. 8, p. 15) and that Charlton knew of his obligation to report bribe offers and that he was in a position to report the matter (Encl. 8, p. 16).

The Regional Director, Internal Revenue Service, and the Civil Service Commission's Regional Office disagreed with the Hearing Officer's application of the Internal Revenue Service's Rules of Conduct for Employees to the facts of this case as they related to Charge II. This difference in application of the rules was supported by substantial evidence and the Civil Service Commission's Board of Appeals and Review concurred in the findings of the Commission's Regional Office and found that ". . . the charges and supporting specifications are sustained by a preponderance of the evidence. . . ." (Encl. 15, p. 2).

The Court has already determined that there has been substantial compliance with all applicable procedural and statutory requirements. Now, after a careful and thorough review of the entire administrative record we are satisfied that there is no genuine issue of material fact in this case, that there is a rational basis for Charlton's removal and that defendants' action is supported by substantial evidence.

Appendix E

"For such cause as will promote the efficiency of the service" is a valid reason for separation from government employment as provided for by the Lloyd-LaFollette Act, 5 U. S. C. § 7501(a) and by the Veterans' Preference Act, 5 U. S. C. § 7512(a). Therefore, defendants' Motion for Summary Judgment must be granted.

An appropriate order will be entered.

ORDER OF COURT.

AND NOW, to-wit, this 28th day of May, 1971, it is hereby ORDERED and DIRECTED that the defendants' Motion for Summary Judgment be and hereby is granted, and judgment is hereby entered in favor of the defendants, United States of America and John W. Macy, Jr., J. Ludwig Andolsek and Robert E. Hampton, Members of the United States Civil Service Commission, and against the plaintiff, George N. Charlton, Jr.

JOHN L. MILLER,
United States District Judge.

cc: Harold Gondelman, Esq.
1018 Frick Building
Pittsburgh, Pennsylvania 15219

Blair A. Griffith, Esq.
First Assistant United States Attorney
633 United States Courthouse
Pittsburgh, Pennsylvania 15219